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## [TryMe? Trademark or Informational Matter?](#)

Posted on April 25, 2011 by [Steve Baird](#)



I'd venture to say that virtually every product sitting on a store shelf is crying out "try me" -- some more colorfully than others, some more subtly than others, some more creatively than others, some more persuasively than others. However, most don't just come out and say the words.

Assuming that to be the case, is it right that only one sauce brand can actually come out and say it?

Hat tip to [GuestBlogger Mark Gallagher](#) of [BlackCoffee](#) for providing the photo on the left and raising the question.

Turns out the "TryMe" brand has a long history, and it was first [registered in 1926](#) with these style and format limitations (making reasonable a single syllable pronunciation with a silent "e"):



Then TRYME [registered in 1996](#), again as a compressed mark, but this time without any style or format limitations (making the "TryMe" usage possible and still supporting the registration), and it now appears from the photos above, that the brand owner favors a compressed style that encourages a two syllable pronunciation ("TryMe").

I'm not sure if [James Brown](#) ever promoted the "TryMe" brand, but it might be a nice fit . . . .



It all leaves me wondering whether this two-syllable usage and migration undermines the validity of the trademark, by placing "TryMe" closer to the category of non-protectable informational matter.

For a sampling of other words and phrases found in certain contexts to be merely informational and not worthy or capable of trademark protection, see below the jump.

[Section 1202.04 of the TMEP](#) provides: "Slogans and other terms that are considered to be merely informational in nature, or to be common laudatory phrases or statements that would ordinarily be used in business or in the particular trade or industry, are not registrable," citing these examples:



- THE BEST BEER IN AMERICA, *In re Boston Beer Co. L.P.*, 198 F.3d 1370, 53 USPQ2d 1056 (Fed. Cir. 1999) (so highly laudatory and descriptive as applied to beer and ale that it is incapable of acquiring distinctiveness);
- CLOTHING FACTS, *In re T.S. Designs, Inc.*, 95 USPQ2d 1669 (TTAB 2010) (informational based on the likely consumer perception of the phrase, when used on a clothing label, in connection with manufacturing information);
- SPECTRUM, *In re Aerospace Optics, Inc.*, 78 USPQ2d 1861 (TTAB 2006) (fails to function as a mark for illuminated pushbutton switches, where the mark is used in a manner that merely informs the potential purchaser of the multiple color feature of the goods, and the coloring and font in which the proposed mark is displayed are not sufficient to imbue the term with source-identifying significance or to set it apart from other informational wording);
- DRIVE SAFELY, *In re Volvo Cars of North America Inc.*, 46 USPQ2d 1455 (TTAB 1998) (phrase perceived as an everyday, commonplace safety admonition that does not function as mark);
- THINK GREEN, *In re Manco Inc.*, 24 USPQ2d 1938, 1942 (TTAB 1992) (“[R]ather than being regarded as an indicator of source, the term . . . would be regarded simply as a slogan of environmental awareness and/or ecological consciousness ....”);
- HI-YO-SILVER, *In re Southbrook Entertainment Corp.*, 8 USPQ2d 1166 (TTAB 1988) (held to be a well known expression closely linked to a character that did not function as a trademark for the goods);
- PROUDLY MADE IN USA, *In re Remington Products Inc.*, 3 USPQ2d 1714 (TTAB 1987) (held incapable of functioning as a mark, notwithstanding use of letters “TM” in connection with prominent display of slogan on packages for the goods and claim of acquired distinctiveness);
- WATCH THAT CHILD, *In re Tilcon Warren, Inc.*, 221 USPQ 86 (TTAB 1984) (held not to function as a mark for construction material notwithstanding long use, where the only use was on the bumpers of construction vehicles in which the goods were transported); and
- FRAGILE, *In re Schwauss*, 217 USPQ 361 (TTAB 1983) (FRAGILE used on labels and bumper stickers does not function as a mark).

So, does "TryMe" indicate the source of sauce to you, or does it merely communicate information, i.e., an express and direct invitation, not to get saucy, but instead to purchase some hot sauce?

